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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION ONE

In re L.M. et al., Persons Coming Under
the Juvenile Court Law.

DEL NORTE COUNTY DEPARTMENT
OF HEALTH AND HUMAN SERVICES,

Plaintiff and Respondent,

v.

B.M.,

Defendant and Appellant.

A155938

(Del Norte County
Super. Ct. Nos. JVSQ14-6111,
JVSQ15-6145)

Appellant B.M. (Father) contends that the juvenile court abused its discretion in denying his Welfare and Institutions Code section 388 (section 388) petition seeking increased visitation with his children L.M. and B.M. The petition was denied on procedural grounds and not on the merits. On appeal, Father does not challenge the court's procedural ruling. Accordingly, we affirm.

DISCUSSION¹

On September 6, 2018, Father filed a request to change a court order under section 388, asking the juvenile court to change his visitation from one hour of supervised visits

¹ This is Father's fourth appeal regarding his two children. We most recently addressed this matter in *In re L.M.* (Apr. 11, 2019, A154551 [nonpub. opinion].) We need not summarize the history of this case as the facts are well known to this court and the parties.

once every three weeks to two- to four-hour unsupervised visits two times a week, along with biweekly overnight visits. He stated that the increase in visitation would be in the best interests of the children in that it would lessen their tendency to act out after his visits because they would know they would see him again in a few days, instead of in a few weeks. Father filed his proof of service the same day as he filed his section 388 petition. He did not serve the Del Norte Department of Health and Human Services (Department) or county counsel with the petition.

At a previously scheduled review hearing held the following day, the juvenile court ordered Father to perform a hair follicle test. Father, representatives of the Yurok Tribe and Choctaw Nation of Oklahoma, and the children's guardians addressed Father's desire for increased visitation. The court ordered visitation increased to once every other week, supervised by the Yurok tribe. Father was instructed to serve a copy of his section 388 petition on county counsel and the Department. A hearing on the petition was set for November 16, 2018.

In the interim, Father's hair follicle drug test came back positive for a high level of methamphetamine, and Father was arrested on numerous felony charges. The Yurok Tribe and the Choctaw Nation decided that visits between Father and the children would not be appropriate at this time, and the Yurok Tribe elected to stop supervising visitation.

On October 9, 2018, the Choctaw Nation requested to withdraw from the case due to the dependency having been dismissed in June 2018, after the legal guardianship was established. The juvenile court granted the request.

On November 16, 2018, the juvenile court heard argument on Father's section 388 petition but took Father's petition off calendar due to his failure to properly serve the petition on all the necessary parties. Reportedly, the children were doing well in the absence of visitation with Father, and the guardians did not want the children to visit Father due to his pending criminal charges and dirty drug tests. This appeal followed.

DISCUSSION

Welfare and Institutions Code section 366.26, subdivision (c)(4)(C) provides that in the case of legal guardianship as the permanent plan, "[t]he court shall also make an

order for visitation with the parents or guardians unless the court finds by a preponderance of the evidence that the visitation would be detrimental to the physical or emotional well-being of the child.” Dependency law affords the juvenile court great discretion in deciding issues relating to parent-child visitation, which discretion we will not disturb on appeal unless the juvenile court has exceeded the bounds of reason. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 318.)

On appeal, we understand Father to contend that the juvenile court wrongly denied him visitation at the November 16, 2018 hearing on his section 388 petition. He appears to misapprehend what actually occurred below. Following a discussion of Father’s pending criminal case and his positive drug test, the court stated: “I think what I’m going to do is *I’m going to drop the matter from calendar because it wasn’t served.* [¶] And you can do it again if you want. But, [Father], my thoughts right now would be—what I’m inclined to do is say when you have a clean hair follicle test, come back and talk to me.” (Italics added.) When Father argued that he should be allowed to visit his children because he was not under the influence during visits, the court stated: “Okay. [Father], my belief is if you’re using, even if you’re not currently under the influence, but if you’re using, that your behavior is different. And given everything that I heard, I’m not likely to do it. *Right now, I’m just turning it down because you haven’t done service.*” (Italics added.) While the court indicated that it was not inclined to grant Father’s petition had it been properly served, the court denied the petition on procedural grounds, and not on the merits. This left intact the prior visitation order entered on September 7, 2018, which Father does not challenge.

Father does not argue that the juvenile court erred in denying his petition for improper service. Nor could he, as he was made aware at the September review hearing of the need to properly serve his section 388 petition on the Department and county counsel, and he failed to do so. Father instead contends it was not his burden to prove he was entitled to visits, claiming “it was the department’s burden to show by a preponderance of the evidence visits were detrimental to the children pursuant to section 366.26, subdivision (c)(4)(C).” However, the Department was under no obligation to

make any showing at the November hearing in response to a petition it had not seen or received.² (See *Arambula v. Union Carbide Corp.* (2005) 128 Cal.App.4th 333, 343 [“The principal purpose of the requirement to file and serve a notice of motion . . . is to provide the opposing party adequate time to prepare an opposition.”].)

Nor did the juvenile court modify the existing September visitation order. Rather, the court observed that there presently was no one to supervise visitation because the Yurok Tribe and the children’s legal guardians had refused to continue doing so after learning of Father’s dirty drug test and his pending criminal charges. Rather than deny visitation, the court appeared to be open to other options for supervision, stating: “Okay. We talked a little bit more about some ideas. Why don’t you go see who you can come up with? And you can talk to the Child Care Council, see if they will do it. If their funding doesn’t allow them to do it under the grant program, maybe they can do it under something else if you pay for it.” From this exchange, it is apparent that the juvenile court did not alter Father’s then existing visitation order, as it suggested he could continue to visit the children if he was able to pay for visitation services or otherwise arrange for appropriate supervision.

The juvenile court acted well within its discretion to dismiss Father’s petition for failure to properly effect service. We find no abuse of discretion.

DISPOSITION

The order is affirmed.

² The Department has not filed a response to Father’s opening brief, taking the position that it was not a party to the proceeding both because Father failed to properly notice it of his section 388 petition and because dependency jurisdiction was terminated on June 1, 2018.

Sanchez, J.

WE CONCUR:

Humes, P. J.

Banke, J.